

MEMORANDUM

State of Alaska Department of Law

TO: Jennifer Roberts, DEC

DATE: August 2, 2017

FILE NO.: AN2016101009

FROM: Cameron Q. Jimmo
Assistant Attorney General
Environmental Section

TEL. NO.: (907) 269-5274

SUBJECT: RE: Wrangell Junkyard
Repository Site

You asked whether the National Environmental Policy Act (“NEPA”) would be triggered by the U.S. Environmental Protection Agency’s (“EPA’s”) involvement in the Wrangell Junkyard Repository Site project. Based on my research, EPA’s involvement would not sufficiently federalize the project for NEPA purposes, but the U.S. Forest Service’s (“USFS’s”) involvement may trigger NEPA depending on the degree of authority USFS has over allowing the project to continue.

i. Factual and legal background.

In lieu of assisting with any removal actions, EPA offered to have its consultant, Ecology and Environment, Inc. submit a design for a monofill repository. The Alaska Department of Environmental Conservation (“DEC”) is contracting out for construction of the repository, and the State will be performing future operation and maintenance. Per your estimation, EPA spent approximately 0.02% percent for design development compared to total projects costs incurred by the State. Recently, USFS informed DEC and EPA that authorization was required for use of National Forest Service road 6259 to transport lead contaminated material to the repository site and that this activity triggers NEPA requirements.

NEPA requires a federal agency to prepare an environmental impact statement for all “major federal actions” that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). “There are no clear standards for defining the point at which

federal participation transforms a state or local project into a major federal action.” *Almond Hill Sch. v. U.S. Dep’t of Agric.*, 768 F.2d 1030, 1039 (9th Cir. 1985). To make this determination, two factors must be considered: (1) “the nature of the federal funds used,” and (2) “the extent of federal involvement.” *Ka Makani ‘O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002).

ii. EPA’s funds associated with this project are not significant enough to trigger NEPA.

If there is not significant federal funding for a state or local project, or there is a great disparity between the forecasted state and federal expenditures for the entire project, there is no federal action sufficient to trigger NEPA requirements. *Ka Makani ‘O Kohala Ohana*, 295 F.3d at 960. For example, the Ninth Circuit in *Ka Makani ‘O Kohala Ohana* found that the sum total of federal funding offered for a state project (\$1.3 million) made up less than two percent of the estimated total project cost and therefore concluded that “federal funding contribution alone could not transform the entire [project] into ‘major federal action.’” *Id.* In contrast, when federal funding accounted for seventy-five percent of a state project’s budget, the project was federalized for NEPA purposes. *See Sierra Club v. U.S. Fish and Wildlife Serv.*, 235 F.Supp.2d 1109, 1121 (D.Or. 2002).

Here, EPA only funded its contractor’s development of the design for the monofill repository. By your estimates, the design development cost approximately \$150,000 – 200,000. Federal funding associated with this state project therefore makes up about 0.02% of the total project costs. Thus a court would likely find these funds are not sufficient to trigger NEPA.

iii. EPA’s involvement is not significant enough to trigger NEPA.

Courts also look to the “degree of [federal] decision-making power, authority, or control over [a state project]” in determining whether the project is federalized for NEPA purposes. *Ka Makani ‘O Kohala Ohana*, 295 F.3d at 960. When a federal agency plays an advisory rather than a decision-making role, the involvement is not sufficient to constitute ‘major federal action.’ *See id.* at 961 (concluding no major federal action

where final decision-making power remained at all times with state); *Almond Hill Sch.*, 768 F.2d at 1039 (concluding no major federal action where federal official sat on advisory panel and offered recommendation to state agency); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990) (stating that in order to have major federal action, a federal agency's authority to influence "must be more than the power to give nonbinding advice to the nonfederal actor . . . the federal agency must possess actual power to control the nonfederal activity") (internal quotation marks and citations omitted).

Here, EPA's contractors provided a design that the State was not required to accept or follow. Further, EPA was not obligated to provide the design in the first place. EPA's offered design resembles the nonbinding advisory actions discussed in the cases above. Therefore, a court will likely find it does not constitute sufficient involvement to trigger NEPA.

iv. USFS's authorization of road use may trigger NEPA requirements.

USFS asserts that authorization is required for use of National Forest Service road 6529. It is unclear from the correspondence you provided where this requirement stems from, and you indicated that this is the first time DEC or the City of Wrangell has been asked to submit a proposal for use of the road.

If this is required under regulation or statute, and the authorization is considered the functional equivalent of a federal permit or decision enabling the state project to continue, NEPA requirements may be triggered. *See* 40 CFR 1508.18(b)(4) (defining "major federal action" to include approval of specific projects, such as actions "approved by permit or other regulatory decision"). I advise that USFS explain the authority behind this authorization and that DEC determine whether a denial would prohibit project completion.